Office-Supreme Court, U.S.
FILED
MAR 19 1963
JOHN F. DAVIS, CLERK

No. 841.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

PASQUALE FIUMARA,

Petitioner,

vs.

TEXACO INC., HUMBLE OIL & REFINING COMPANY, GULF OIL CORPORATION and SINCLAIR REFINING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION.

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This is a case in which a plaintiff makes a charge in a complaint but has no evidence to support it even after the full arsenal of federal discovery procedures has been made available to him.

There has never been any genuine issue as to a material fact in this case. Petitioner, in the absence of any evidence from which a trier of fact might infer illegality, rested on the bare conclusory allegations of his complaint.

This was plainly insufficient to defeat respondents' motion for summary judgment, since "the very mission of [that] procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."[1]

The questions presented by the petition, and the reasons advanced for granting the writ, are fanciful. There is no conflict between the decision below and any decision of this Court or another Court of Appeals. Nor was anything decided below of importance to anyone except the particular litigants.

What the present case involves is a naked claim of a horizontal conspiracy to fix prices in violation of the antitrust laws. The claim was based solely on the fact that each of the four respondent oil companies, acting at different times over a period of almost a year pursuant to applicable fair trade legislation, established a similar minimum resale price for gasoline of comparable quality in the Philadelphia area (R. 11a-12a).[2] At his deposition, petitioner conceded that he had no other evidence, documentary or oral, to support his claim of conspiracy (R. 10b-15b). When respondents thereafter moved for summary judgment, petitioner took the position that he was entitled to rely on the allegations of his complaint and that these, without more, necessitated a trial. Before granting the motion, the District Court gave petitioner every conceivable opportunity to present some evidence of conspiracy (R. 19b-20b), but none

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[1] Judicial Conference of the United States, Report of Proposed Amendments to Certain Rules of Civil Procedure for the United States District Courts (September, 1962), 31 F. R. D. 35, 62 (1963).

[2] Record references are to the appendices to the briefs in the court below. Where the number is followed by an "a", the reference is to a page of the appendix of plaintiff-appellant below (petitioner herein). Where the number is followed by a "b", the reference is to a page of the appendix of defendants-appellees below (respondents herein).

was forthcoming. Judgment, accordingly, was entered for respondents on the ground that there was no genuine issue as to any material fact and respondents were entitled to judgment as a matter of law. Thereafter, the Court of Appeals affirmed without opinion.

It is noteworthy that this very same Court of Appeals was referred to by the Judicial Conference because of certain early decisions[3] in which it permitted "the pleadings themselves to stand in the way of granting an otherwise justified summary judgment"—a doctrine that was declared to be "incompatible with the basic purpose of the rule" (31 F. R. D. at 62). Indeed, these decisions—although the Third Circuit itself subsequently departed from them—have just spawned an amendment to Rule 56 to make clear that when "a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." It was hoped that this amendment would "contribute to the more effective utilization of the salutary device of summary judgment" (31 F. R. D. at 62). The fact that the Third Circuit, which has been so notoriously reluctant to sustain a motion for summary judgment, did so in this case is eloquent testimony of the sham nature of petitioner's claim.

The record in this case does not bear the slightest resemblance to that in *Poller* v. *Columbia Broadcasting Co.*, 368 U. S. 464 (1962), where the plaintiff came forward with sufficient proof to create a triable issue of fact. Here, petitioner came forward with nothing.

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[3] *E.g.*, *Frederick Hart & Co., Inc.* v. *Recordgraph Corp.*, 169 F. 2d 580 (3d Cir. 1948); *United States ex rel. Kolton* v. *Halpern*, 260 F. 2d 590 (3d Cir. 1958).

Since the issue below was whether there was any proof of a horizontal price fixing conspiracy among respondents, not whether the fair trade program of each respondent was enforceable against its respective dealers, such cases as *Esso Standard Oil Co.* v. *Secatore's, Inc.*, 246 F. 2d 17 (1st Cir. 1957), *cert. denied*, 355 U. S. 834 (1957), *Gillette Company* v. *Master*, 408 Pa. 202, 182 A. 2d 734 (1962), *Gulf Oil Corp.* v. *Mays*, 401 Pa. 413, 164 A. 2d 656 (1960), and *Sinclair Refining Co.* v. *Schwartz*, 398 Pa. 60, 157 A. 2d 63 (1959), cited by petitioner, are entirely beside the point.

The petition presents no question worthy of review by this Court. There is no conflict to be ironed out and no important principle to be considered. The petition, accordingly, should be denied.

Respectfully submitted,

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